No. 90-18

In The

Supreme Court of the United States

October Term, 1990

ROBERT D. GILMER,

Petitioner,

v.

INTERSTATE/JOHNSON LANE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF ON THE MERITS FOR PETITIONER

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QUESTION PRESENTED

Are claims brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), subject to compulsory arbitration?

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Petitioner Robert D. Gilmer (hereinafter "Gilmer") respectfully prays that the decision of the United States Court of Appeals for the Fourth Circuit issued on February 6, 1990, be reversed.

I.

CITATION TO OPINIONS BELOW

The decision of the Fourth Circuit is officially reported at 895 F.2d 195. The Court's decision appears in Appendix "A" of the Petition for Writ of Certiorari (App. 1a-36a). The decision of the Fourth Circuit denying Gilmer's petition for rehearing and suggestion for rehearing in banc appears in Appendix "B" of the Petition for Writ of Certiorari (App. 37a-38a). The decision of the U.S. District Court for the Western District of North Carolina appears in Appendix "C" of the Petition for Writ of Certiorari (App. 39a-42a).

II.

JURISDICTION

The decision of the Fourth Circuit was issued on February 6, 1990. Gilmer's petition for rehearing and suggestion for rehearing in banc were denied on March 28, 1990. Gilmer filed his petition for writ of certiorari within 90 days of that date as required under 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of the United States Supreme Court. Gilmer invoked this Court's jurisdiction

under 28 U.S.C. § 1254(1). This Court granted certiorari on October 1, 1990.

III.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Age Discrimination in Employment Act (29 U.S.C. § 626(c)) provides in pertinent part as follows:

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *provided*, that the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this Chapter.
>
> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

The entire text of sections 621, 623, and 626 of the ADEA is reproduced in an Appendix to this Brief.

IV.

STATEMENT OF THE CASE

A. THE FACTS

Defendant Interstate Securities Corporation ("Interstate") hired Gilmer on May 18, 1981, as Manager of Financial Services. One week after he was hired, Gilmer was required to sign a registration application with the New York Stock Exchange ("NYSE"). The application is four pages long and written in six-point type. Paragraph V of the registration form, also in six-point type, provides as follows: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions or bylaws of the organizations with which I register. . . . " (J.A. 18)

NYSE Rule 347, which was not reproduced on Gilmer's application, provides for the arbitration of "[a]ny controversy . . . arising out of the employment or termination of employment" of a registered securities representative. Neither the application nor Rule 347 makes any specific reference to age or other employment discrimination claims. Moreover, neither spells out precisely what arbitration means.

More than six years later, Interstate terminated Gilmer's employment. Gilmer was 62 years old when he was terminated, and his replacement was 28 years old. Gilmer filed suit under the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621, *et seq.*, hereinafter referred to as "ADEA"), to secure reinstatement, and full restitution and payment of all lost wages and benefits resulting from his discharge. (J.A. 8) The jurisdiction of the court was conferred by § 7(c) of the ADEA (29 U.S.C. § 626(c)) and § 15(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)). (J.A. 4-5)

Interstate filed a motion to compel arbitration and to dismiss Gilmer's complaint because of the arbitration clause in the NYSE registration application. (J.A. 10-12)

B. PROCEDURAL HISTORY

The U.S. District Court for the Western District of North Carolina held that Gilmer could not be compelled to arbitrate his ADEA claim. (App. 39a-42a.)

Interstate appealed to the Fourth Circuit, which reversed the District Court's decision, concluding that there was no indication of congressional intent to bar compulsory arbitration of ADEA claims and that there was no invalid prospective waiver of the judicial forum for Gilmer's ADEA claims. (App. 1a-36a.)

Gilmer petitioned the Fourth Circuit for rehearing and suggestion for rehearing in banc. By order dated

March 28, 1990, the Fourth Circuit denied the petition. (App. 37a-38a.)

Gilmer petitioned this Court for a Writ of Certiorari within 90 days, as required by 28 U.S.C. § 2101(c) and Rule 13(1) of the Rules of United States Supreme Court. Certiorari was granted on October 1, 1990, on the issue of whether ADEA claims can be subjected to compulsory arbitration.

V.

SUMMARY OF THE ARGUMENT

This Court has consistently held that statutory claims involving minimum substantive guarantees to workers are not subject to compulsory arbitration, notwithstanding the federal policy favoring arbitration. With regard to claims arising under Title VII, the Fair Labor Standards Act, 42 U.S.C. § 1983, and the Federal Employees Liability Act, the Court has held that claimants were not bound by the unfavorable decisions of arbitrators and were still entitled to pursue their claims in court. There is no meaningful distinction between the Age Discrimination in Employment Act and these other types of claims; therefore, the Court should find that ADEA claims are not subject to compulsory arbitration. Moreover, there is no meaningful distinction between arbitration pursuant to collective bargaining agreements or the Railway Labor Act, in which the Court has refused to compel arbitration, and the Federal Arbitration Act, which is at issue in this case. Although this court has held in three cases that agreements to arbitrate were enforceable with respect to

federal statutory claims, those cases arose in a business context, and the reasoning of those decisions does not apply in employment discrimination cases.

Even if this Court should deem it appropriate to apply the two-part test as set forth in *Mitsubishi v. Soler Chrysler-Plymouth*, it should nonetheless hold that ADEA claims are not subject to compulsory arbitration. Under the *Mitsubishi* test, a statutory claim will not be arbitrable if either (1) there is no valid agreement to arbitrate, or (2) Congress has evidenced an intent to preclude arbitration. Here, the congressional intent is clear. Congress has recently stated in the Title VII context that, although arbitration and other forms of alternative dispute resolution are to be encouraged, they should not preclude claimants from pursuing the remedies provided by statute. Moreover, compulsory arbitration is inconsistent with the statutory scheme Congress set forth in Title VII and the ADEA. Congress' intent to remedy age discrimination would be frustrated by compulsory arbitration because the NYSE Rules would force plaintiff's claim to be heard by arbitrators from the very industry that is the defendant. Arbitration's restricted discovery makes it difficult for plaintiffs to prove the subtle discrimination that Congress intended to eradicate. The lack of written opinions makes appeal difficult, disguises compromise awards, and makes it impossible for employers to gauge the legality of their conduct. The severely limited grounds for appeal of an arbitrator's award conflict with the congressional intent to provide "overlapping remedies" to plaintiffs under the employment discrimination laws. Although they can resolve the immediate dispute between the parties, arbitrators cannot monitor

long-term injunctive relief or make sweeping institutional reform, which is often necessary in employment discrimination cases. Finally, the main focus of arbitration is economic, whereas Congress' main focus under the ADEA is personal dignity and equal protection, issues that are most appropriately addressed by the courts.

VI.

ARGUMENT

A. THIS COURT HAS RECOGNIZED THAT CERTAIN CLAIMS BASED ON INFRINGEMENTS OF INDIVIDUAL RIGHTS ARE NOT SUBJECT TO COMPULSORY ARBITRATION, AND AGE DISCRIMINATION SHOULD BE ONE OF THOSE CLAIMS.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), this Court unanimously held that an employee alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, (hereinafter "Title VII"), was entitled to a trial *de novo* after his claim for race discrimination was arbitrated unsuccessfully pursuant to a collective bargaining agreement. This Court held as follows:

> [W]e have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." . . . Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII . . . [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. . . . On the other hand, the resolution

> of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

415 U.S. at 56-57, 94 S. Ct. at 1023-24, 39 L. Ed. 2d at 163 (citations and footnote omitted).

Similarly, in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), this Court held that a claimant under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereinafter "FLSA"), was not barred by the unfavorable decision of an arbitrator. The claimants, truck drivers, had alleged that pre-trip safety inspection and transportation time was compensable under the FLSA. This Court declared: "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." 450 U.S. at 740, 101 S. Ct. at 1441, 67 L. Ed. 2d at 653. The ADEA is part of the FLSA.

In *McDonald v. City of West Branch*, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984), where a police officer alleged that he was discharged for exercising his constitutional rights, this Court held that an arbitrator's decision in a civil rights claim under 42 U.S.C. § 1983 has no *res judicata* or collateral estoppel effect, regardless of whether the parties had an agreement to the contrary.

The foregoing cases involve statutes analogous to the ADEA. Title VII, § 1983, and the ADEA focus on personal dignity and equal protection. Both Title VII and the ADEA are designed to ensure that employment decisions

are not based on characteristics that are beyond the employee's control and that have no relevance to job performance. "In fact, the prohibitions of the ADEA were derived in *haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S. Ct. 866, 872, 55 L. Ed. 2d 40, 48 (1978). As already noted, the ADEA is part of the FLSA and incorporates the FLSA's remedies.

Alexander, Barrentine, and *McDonald* involved arbitration pursuant to collective bargaining agreements rather than the Federal Arbitration Act ("FAA"), which is at issue in this case. However, there is no meaningful distinction between the two. Indeed, in some respects arbitration of employment discrimination claims under the FAA is even less appropriate than labor arbitration; for example, a labor arbitrator issues a written opinion, whereas a commercial arbitrator does not. If arbitration of employment discrimination and analogous claims under a collective bargaining agreement is inappropriate, then arbitration of such claims under the FAA is also inappropriate.

Respondent contends that the reasoning of *Alexander, Barrentine*, and *McDonald* is outdated by this Court's more recent decisions on arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985) (involving claims under Sherman Act), the Court held that arbitration under the FAA was not necessarily precluded simply because a plaintiff was invoking a statutory right. The Court set forth a two-part test to determine whether an agreement

to arbitrate was enforceable: a plaintiff could not be compelled to arbitrate if (1) the dispute was outside the scope of the arbitration clause, or (2) Congress evidenced an intent to preclude arbitration. *Id.*

The Court has upheld agreements to arbitrate federal statutory claims in two decisions after *Mitsubishi*. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332, 96 L.Ed.2d 185, *reh'g denied*, 483 U.S. 1056, 108 S. Ct. 31, 97 L.Ed.2d 819 (1987), the Court held that mandatory arbitration of claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act was not precluded. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917, 104 L.Ed.2d 526 (1989), the Court held that mandatory arbitration of claims under the Securities Act of 1933 was not precluded, overruling its prior decision in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953).

In contrast to the case at bar, *Mitsubishi, McMahon* and *Rodriguez de Quijas* involve disputes arising in a business context.[1] They differ from employment discrimination in several essential ways: First, they involve parties of relatively equal bargaining power or at least with the freedom to walk away from a bad bargain. This is not the case in employment: a job applicant's very livelihood may depend on his agreeing to the arbitration clause.

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[1] *Compare Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520, 96 L.Ed.2d 426 (1987) (FAA preempts California statute precluding compulsory arbitration of wage collection claims). The sole issue in *Perry* was whether the FAA preempted state law to the contrary.

Second, these business-oriented claims do not implicate statutes "designed to provide minimum substantive guarantees to individual workers." *See Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987) (railroad employee bringing suit under Federal Employees Liability Act cannot be compelled to arbitrate, even though Railway Labor Act ("RLA") provides for arbitration).

In *Buell*, this Court, unanimously recognizing that RLA claims are distinguishable from the more economic, contract-oriented claims at issue in *Mitsubishi, McMahon*, and *Rodriguez de Quijas*, did not apply the *Mitsubishi* test:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. *See, e.g., McDonald v. West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Barrentine, supra*, at 737, 67 L. Ed. 2d 641, 101 S. Ct. 1437.

Buell, 480 U.S. at 564-65, 94 L. Ed. 2d at 572-73. *Buell*, unanimously decided two years after *Mitsubishi*, demonstrates that this Court has wisely treated employment discrimination and related claims as "a breed apart" from

the kinds of claims at issue in *Mitsubishi*, *McMahon*, and *Rodriguez de Quijas*. Nor did the Court distinguish arbitration pursuant to a collective bargaining agreement from arbitration pursuant to a federal statute (RLA). There is no reason to treat arbitration under the RLA differently from arbitration under the FAA.

Every circuit that has addressed the issue, except the Fourth, has held that Title VII or ADEA claims are not subject to compulsory arbitration. *See Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990) (Title VII); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 842, 107 L. Ed. 2d 836 (1990) (Title VII); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir. 1989) (ADEA); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S. Ct. 143, 107 L. Ed. 2d 102 (1989) (Title VII).

This Court should apply its reasoning in *Alexander, Barrentine, McDonald*, and *Buell* to the ADEA because it is a statute "designed to provide minimum substantive guarantees to individual workers." The decision of the Fourth Circuit, which is contrary to the decisions of the other circuits, should be reversed.

B. EVEN UNDER THE *MITSUBISHI* TEST, ADEA CLAIMS ARE NOT SUBJECT TO COMPULSORY ARBITRATION.

Under this Court's decisions in *Alexander, Barrentine, McDonald*, and *Buell*, it is unnecessary to apply the *Mitsubishi* test to an employment discrimination claim. Even if the *Mitsubishi* test were to apply, this Court should nonetheless hold that ADEA claims are not subject to compulsory arbitration.

Assuming a valid agreement to arbitrate, which in this case Gilmer has denied,[2] under *Mitsubishi* this Court would next examine whether Congress has evidenced an intent to preclude binding agreements to arbitrate ADEA claims. Clearly, Congress has done so.

1. Congress Has Expressly Indicated Its Intent to Preclude Binding Arbitration of Employment Discrimination Claims.

When the ADEA was enacted in 1967, it was unnecessary for Congress to expressly preclude arbitration because the case law at the time precluded arbitration of statutory claims. *See, e.g., Wilko v. Swan, supra*. Not surprisingly, the ADEA itself contains no express language indicating congressional intent with regard to arbitration; however, after this Court's more recent decisions in *Mitsubishi, McMahon*, and *Rodriguez de Quijas*, Congress did make such an expression of intent in the Title VII context. In the Civil Rights Act of 1990, which was passed by Congress but vetoed by President Bush, Congress made it clear that, although arbitration of Title VII claims was to be encouraged, Title VII claimants should not be bound

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[2] Gilmer contended below that the NYSE registration application was void for lack of consideration because it was signed eight days after Gilmer was hired. *See Investment Properties, Inc. v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342 (1972) (contract must be supported by consideration); *Greene Co. v. Kelley*, 261 N.C. 166, 168, 134 S.E.2d 166 (1964) (once employment relationship exists, agreement thereafter must be in nature of new contract based on new consideration). However, this Court granted certiorari only as to the issue of whether ADEA claims in general are subject to compulsory arbitration.

by the unfavorable decision of an arbitrator. Moreover, Congress has expressly approved of the reasoning in *Alexander*. *See* Joint Explanatory Statement of the Committee of Conference, Conf. Rep. No. 856, 101st Cong., 2d Sess. 26 (1990):

> The Conferees emphasized, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Conferees believe that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement *or in an employment contract*, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Conferees do not intend this section to be used to preclude rights and remedies that would otherwise be available.

(Emphasis added.) Although this language refers to Title VII rather than the ADEA, the two statutes are analogous; therefore, because Congress intended to preclude binding arbitration of Title VII claims, one can assume with confidence that Congress intended the same for ADEA claims. Based on this clear expression of congressional intent, this Court should hold that ADEA claims are not subject to compulsory arbitration.

2. Compulsory Arbitration Would Frustrate Congress' Clear Purpose to End Age Discrimination Through the Statutory Scheme It Provided in the ADEA.

Not only has Congress clearly expressed its intent that employment discrimination claims not be subject to compulsory arbitration; Congress has also established a statutory scheme for such claims that is inconsistent with compulsory arbitration.

In enacting Title VII and the ADEA, Congress created a detailed and unique statutory scheme clearly aimed at eliminating discrimination in employment. *Alexander*, 415 U.S. at 44, 39 L. Ed. 2d at 155-56 (Title VII). The Equal Employment Opportunity Commission ("EEOC") was created with the authority to investigate and attempt to conciliate charges of discrimination. The EEOC is authorized to institute civil actions against employers or unions. No action can be maintained under either Title VII or the ADEA unless a timely charge is filed with the EEOC. Compulsory arbitration of Title VII and ADEA claims would conflict with this statutory scheme and undermine the role of the EEOC, the agency Congress created to handle these claims.

In addition, arbitration provides an inappropriate forum for employment discrimination claims, in part because of the way arbitration works, especially arbitration under the NYSE rules.[3] Panels under the Rules are generally made up of a majority of "public arbitrators"

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[3] Since Gilmer brought this action, the NYSE has amended its rules. The amendments are reported at 54 Fed. Reg. 21144. Presumably the new rules would apply if Gilmer were to arbitrate his claim; therefore, this discussion will focus on the new rules. The changes with respect to disclosure of arbitration clauses would not apply to Gilmer, because he executed his agreement under the old rules. As will be demonstrated *infra*, the disclosure to Gilmer fell woefully short of the requirements under the new rules.

and a minority of "industry arbitrators." 54 Fed. Reg. at 21145. However, the panels hearing employment disputes are made up entirely of industry arbitrators. *See* NYSE Rule 632.

A panel of industry arbitrators means that a discrimination claimant is not assured an unbiased hearing. As one commentator aptly noted, "The same industry experience and expertise that makes a private arbitrator attractive as an alternative to a judge for economic claims arising under ERISA, the securities laws, and RICO may render the arbitrator in a discrimination case subject to the very biases that the Title VII plaintiff is seeking to remedy." Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 Texas L. Rev. 509, 569 (1990) (hereinafter *Shell*).

Another problem with arbitration is its much more limited discovery than provided under the Federal Rules of Civil Procedure. Although the new rules broaden the discovery that is available, *see generally* 54 Fed. Reg. at 21149-51, there are still significant weaknesses. Even under the new rules, taking a deposition is at the discretion of the arbitrator. *Id.* at 21150. The claimant must demonstrate that the deposition is necessary to develop his case. *Id.* In addition, the new rules, like the old, contain no specific sanctions for failure to meet discovery deadlines. *Id.* This restricted discovery enables the industry to thwart Congress' intent to redress age discrimination because the industry is more likely than the employee to have possession of relevant documents and other information. *Id.*

Moreover, in modern times discrimination has become subtle, and this subtlety of discrimination makes

liberal discovery vital to a plaintiff's case. *See, e.g., O'Brian v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982), *overruled on other grounds by Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987); *Rajender v. Univ. of Minnesota*, 546 F.Supp. 158 (D. Minn. 1982). *See also* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vanderbilt L. Rev. 905 (1978) (hereinafter *Belton*):

> Employment discrimination litigation prior to Title VII presented easy and obvious targets such as explicit policies or union contracts excluding blacks from desirable jobs, segregated departments and facilities, or discriminatory pay scales. Much of the overt racial discrimination was eliminated by the Plans for Progress and state FEP Commission Activities. By 1965 overt discrimination on the basis of race was not fashionable. The forms of employment discrimination at the time Title VII became effective were far more subtle.
>
> . . .
>
> The more subtle brand of discrimination did not constitute the easiest target for an effective litigation campaign to eradicate the effects of job discrimination. Consequently, Title VII litigation required substantial manpower to analyze the voluminous records and extremely technical factual and legal questions involved. Proving the existence of discrimination in hiring, testing, seniority, and promotion practices proved demanding.

Id. at 927-28 (footnotes omitted). Discrimination is sometimes even more subtle in age discrimination cases.

The limited discovery permitted under the NYSE Rules makes subtle discrimination almost impossible to

prove. The NYSE Rules have no provision equivalent to Rule 26(b)(1) of the Federal Rules of Civil Procedure, which allows a party to discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." The rules providing that depositions may be taken only at the discretion of the arbitrator, and the Rules' lack of provision for sanctions or other penalties for failure to comply with discovery requests, put an employment discrimination plaintiff at a severe disadvantage.

Another important difference between arbitration under the NYSE Rules and a judicial proceeding is that arbitration does not require the issuance of a written opinion. *See id.* at 21151. Of course, in a bench trial, the judge must set forth the relevant facts and the law as applied to the facts.

The absence of written arbitrators' opinions creates severe problems for age discrimination claimants. It makes appeal extremely difficult because the employee is unable to determine the grounds for the award. It is impossible to determine which facts the arbitrator considered determinative, which law the arbitrator applied, how the arbitrator applied the law, or even whether the arbitrator applied the law. In addition, the lack of a written opinion can hide a compromise award. Although this may be appropriate in routine contractual disputes, it is singularly inappropriate in employment discrimination cases, considering Congress' strong policy against discrimination in the workplace. *See, e.g.*, 29 U.S.C. § 621(b).

Finally, the lack of a written opinion means that arbitration terminates disputes "informally and silently." Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 Tulane L. Rev. 1 (1987) (hereinafter *Brunet*). The risk of adverse publicity that comes from a written opinion creates a strong incentive for employers to comply with the anti-discrimination laws, and compulsory arbitration of such claims substantially weakens that incentive.

The lack of a written opinion harms employers as well as employees. The body of employment law serves a preventive and planning function for employers. Employers use legal precedent to determine how they can best comply with the law, especially statutes with broad language like Title VII and the ADEA. "In this respect, law prevents rather than contributes to litigation." *Brunet, supra*, at 23. The lack of written opinions, if arbitration became widespread, would make it impossible for employers to determine whether their conduct in hiring, promoting, establishing seniority policies, providing benefits to employees, and making disciplinary and discharge decisions, was in compliance with the law. "As the guidance function of law is eroded by [alternative dispute resolution's] receiving a larger market share of disputes, we can anticipate additional 'disputes' arising as law loses its ability to lead or influence societal behavior." *Id.* at 23-24. Thus what in the short run seems to be a relatively inexpensive and efficient means of resolving disputes could in the long run create more uncertainty of the law and actually increase the number of disputes.

A coherent body of employment discrimination law is necessary to achieve Congress' intent of ending employment discrimination:

> The emergence of a coherent body of employment discrimination law provided the necessary background for meaningful implementation of the national policy against employment discrimination. . . . The potential of multi-million dollar awards for unlawful employment discrimination emphasized that failure to comply with Title VII exposed respondents to substantial financial liability.
>
> This coherent body of law made it possible for the federal government to negotiate settlements with AT&T, as well as nationwide settlements with the trucking and basic steel industries. Other employers and unions became more amenable to voluntary compliance agreements with the EEOC and private plaintiffs to remedy individual claims of employment discrimination and to take steps to revise employment policies to assure that similar claims would not arise in the future.

Belton, supra, at 950-51.

Finally, the grounds for vacating an arbitration award are extremely narrow. An arbitration award may not be set aside for a mistake in law. *Id.* n. 45. Rather, the challenger must show "manifest disregard" of the law. *Id.* at 21151. *See also id.* n. 45: "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to pay no attention to it."

Thus, a claimant who submits to arbitration is in effect surrendering his right to appeal an adverse decision.

This scheme is completely inconsistent with Congress' intent in Title VII and the ADEA to provide "overlapping remedies" to claimants. Under the congressional scheme, a claimant under either statute must first submit his claim to his state human rights organization, if one exists. When the state proceedings terminate, the claimant may file a charge with the EEOC. If the EEOC issues a "no cause" determination, the claimant may still bring a lawsuit in the courts, with the right to appeal mistakes of law. "Title VII's overlapping system of state, federal, and administrative remedies expresses a strong congressional concern that victims of discrimination have access to multiple forums." *Shell, supra*, at 568. Arbitration, by contrast, affords a claimant only one opportunity to present his case.

The NYSE recognizes these weaknesses in arbitration, as evidenced in its new rules on pre-dispute disclosure. The new rules, which were not in effect when Gilmer signed the arbitration agreement, require that the arbitration clause be preceded by the following warnings:

> [T]hat [customers] are waiving their right to seek remedies in court, that arbitration is final, that discovery is generally more limited than in court proceedings, that the award is not required to contain factual findings and legal reasoning, and that the arbitration panel typically will include a minority of arbitrators associated with the securities industry.

Id. at 21153. It is clear, then, that a claimant who agrees to arbitrate is giving up significant procedural rights that Congress intended to provide.

Arbitration is inadequate not only to redress individual cases of discrimination, but also to accomplish Congress' goal of addressing the systemic social ill of discrimination. "Commercial arbitration is focused too narrowly on specific transactions to give effect to the institutional goals of the ADEA." *Shell, supra,* at 572. Arbitration is "transactional" in focus, but the employment discrimination statutes are "institutional" in focus:

> First, Title VII is not only a remedial statute; it is an attempt to address a systemic social ill – discrimination – that is deeply embedded in the cultural fabric. The adjudication of a Title VII claim is both an opportunity to reverse an instance of discrimination and an occasion for examining the institutions that made discrimination possible. The Court in *Alexander* recognized this aspect of Title VII when it stated that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory practices." Commercial arbitration is not well situated to serve this institutional goal because it is essentially transactional in focus. Securities arbitrators are appointed for a single case to review a specific complaint. Their remedial powers are limited to granting or denying relief requested by the particular parties before them and do not include monitoring long-term injunctive relief or making sweeping institutional reforms.

Id. at 568 (footnotes omitted).

Many of the remedies that courts have used to carry out the congressional purpose behind Title VII (also appropriate in the ADEA context) are beyond the authority of an arbitrator:

> The courts held that § 703(j) [42 U.S.C. § 2000e-2(j) (1970)], the so-called antipreferential treatment provision, does not preclude the imposition of quotas, goals, or timetables, as long as they are imposed to correct present effects of past discrimination or current unlawful employment practices. Appropriate seniority adjustments under a "rightful place" theory were ordered to remedy both the pre-Act and post-Act discriminatory effects of facially neutral seniority practices. Recruitment and training programs were ordered, and objective selection criteria were required to replace subjective criteria.

Belton, supra, at 946-47. An arbitrator, although perhaps qualified to order reinstatement and back pay, has no authority to play this institutional role in enforcing the employment discrimination statutes. *Shell, supra,* at 568.

Finally, although employment discrimination claims do have an economic component, the main focus is on personal dignity and equal protection. *See Shell, supra,* at 570 (Title VII), 572 (ADEA). These are "precisely the kinds of 'core value' questions that should be reserved for a court." *Id.* at 572.

Both because of the inadequate procedural protection it affords and because of its focus on resolving commercial disputes rather than protecting individual rights, commercial arbitration is clearly inappropriate for the resolution of employment discrimination claims. To allow compulsory arbitration of such claims would frustrate

Congress' intent to provide a judicial forum for those who are subjected to age discrimination.

CONCLUSION

The ADEA, like Title VII, the FLSA, and 42 U.S.C. § 1983, provides minimum substantive guarantees to workers; therefore, the Court should hold that ADEA claims are not subject to compulsory arbitration. Even if the Court applies the *Mitsubishi* test, it should hold that ADEA claims are not subject to compulsory arbitration: first, Congress has clearly expressed its intent that claims under Title VII, which is analogous to the ADEA, not be subject to binding arbitration; and second, compulsory arbitration is inconsistent with the detailed statutory scheme Congress provided in the ADEA.

For the aforesaid reasons, the decision of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub.L. 90-202, § 2, Dec. 15, 1967, 81 Stat. 602.)

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way

which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification

or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the –

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken –

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(i)[1] **Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees**

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits –

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit

[1] So in original. Two sub secs. (i) have been enacted.

plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan –

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution

of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with

respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection –

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(As amended Pub.L. 99-272, Title IX, § 9201(b)(1), (3), Apr. 7, 1986, 100 Stat. 171; Pub.L. 99-509, Title IX, § 9201, Oct. 21, 1986, 100 Stat. 1973; Pub.L. 99-592, §§ 2(a), (b), 3(a), Oct. 31, 1986, 100 Stat. 3342; Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233.)

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as

prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

(Pub.L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; Pub.L. 95-256, § 4(a), (b)(1), (c)(1), Apr. 6, 1978, 92 Stat. 190, 191; 1978 Reorg. Plan. No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)